despotic that any Government should be able to deprive its citizens of their property under the guise of giving therefor a fair return which may later be retracted.

CONTINGENT REMAINDERS AND INHERITANCE TAXATION.—As an attribute of its sovereignty a State has undisputed power over testamentary disposition, and can therefore impose a tax upon inheritance, which is not considered a tax upon the property devised, but upon the right of succession under a will.[1] This power is however subject to the limitation that rights once accrued are immune from taxation subsequently imposed,[2] otherwise the tax would be upon the property and not upon the succession. Accordingly a vested remainder is clearly not subject to a tax imposed by subsequent legislation.[3] In the recent case of *In re Smith* (1912) 135 N. Y. Supp. 240, a tax imposed by a statute passed subsequently to the death of the testator, but before the termination of the life estate created by the will, was held to be inoperative upon a contingent remainder limited to persons not ascertained. The decision proceeds on the theory that the right of succession accrued when the will became effective, and necessarily involves an examination into the nature of a contingent remainder during the existence of the preceding particular estate.

It is probable that in the earlier days of the common law contingent remainders were unknown.[4] As soon, however, as it was realized that they took effect by way of succession from the feoffor, and not by way of interruption of the previous particular estate, leaving accordingly no gap in the seisin, they became a common form of future interest in land.[5] That they were established without being completely analyzed and understood, might be suspected from the indefinite theories advanced as to the *locus* of the inheritance prior to the vesting in possession of the remainder, which was variously regarded as in abeyance, *in nubibus* or *in gremio legis*.[6] Even when fully accepted the interest of a contingent remainderman was extremely shadowy and precarious, easily susceptible of destruction by a merger of the life estate with the

[1]Ross, Inheritance Taxation § 4; U. S. *v.* Perkins (1896) 163 U. S. 625; *In re* Macky (1909) 46 Colo. 79. The fact that the State may tax the right to inherit United States bonds clearly shows that the tax is imposed upon the right to succession, and not upon the property itself. Wallace *v.* Myers (1889) 38 Fed. 184.

[2]Matter of Seaman (1895) 147 N. Y. 69.

[3]Ross, Inheritance Taxation § 36. A statute expressly including vested interests as taxable is unconstitutional. Matter of Pell (1902) 171 N. Y. 48.

[4]Williams, Real Prop. (20th ed.) 346. This view has the sanction of Professor Gray, Perp. § 100.

[5]See article by Edward Jenks, 20 L. Q. Rev. 280. That the remainder takes effect not upon a condition, of which only the grantor or his heirs could take advantage, but is a limitation upon the particular estate, see Colthurst *v.* Bejushin (1550) Plow. 21, 31; 8 Bac. Abr. (Am. Ed.) 380 *et seq.* The first contingent remainder was probably recognized in 1431. Y. B. 9 Hen. VI., Trin. term, pl. 19. See Williams, Real Prop. (20th ed.) 347.

[6]See Fearne C. R. (10th ed.) 360-364; Carter *v.* Barnardiston (1718) 1 P. Wms. 505. The correct view would seem to be that a reversion remains in the feoffor, Fearne C. R. (10th ed.) 361, Gray, Perp. § 11, note 1, though the old view is maintained by eminent authority. See Gray, Perp. § 11, note 1 *supra*.

inheritance,[7] or by the life tenant's tortious feoffment,[8] though preserved if supported by the latter's right of entry when disseised.[9] It was, moreover, inalienable *inter vivos*.[10] Under the feudal system of tenure all alienation was at first impossible, and restraint was gradually removed from the more valuable estates in land only in accordance with the demands of progressive civilization. That it was not so removed from contingent remainders indicates that they were not regarded as property but as mere possibilities of negligible importance.[11] A fine or recovery, however, would operate by way of estoppel to pass the interest when, if ever, it became vested in the remainderman and his heirs, no interest passing until that event took place.[12] The same result was reached in equity, which gave effect, possibly also by way of estoppel, to the assignment of a contingent remainder, by regarding it as an executory contract to convey the interest upon its vesting in possession, which was specifically enforced at that time, if founded upon sufficient consideration.[13] As the heir was the legal successor of the deceased it was transmissible to him together with rights of entry and mere possibilities,[14] and though not at first regarded as devisable under the Statute of Wills, or, at least, where the Statute was not before the court,[15] it was later so held under a liberal construction of the act, where the remainderman was ascertained.[16] If the remainderman is originally not ascertained, as in the principal case, it is clear that his interest cannot be contingent at his death; it must be destroyed by the non-fulfillment of the condition, if not already vested by his previous ascertainment.

It thus seems that at common law a contingent remainder is not an estate, but merely a right to have an estate upon the happening of some condition precedent.[17] It seems at best a possibility coupled with an interest,[18] and, indeed, it has been said that no interest passes at its creation.[19] But as it is the succession that is taxed, the succession

[7]Challis, Real Prop. (3rd ed.) 137.

[8]Archer's Case (1597) 1 Co. 64.

[9]Fearne (10th ed.) C. R. 286, Butler's note. If the right of entry were turned into a right of action by the death of the disseisor the contingent remainder was, however, destroyed, Fearne C. R. (10th ed.) 286—another instance of its frailty.

[10]Williams, Real Prop. (20th ed.) 357.

[11]See Williams, Real Prop. (20th ed.) 358, 359.

[12]Weale *v.* Edwards (1672) Pollexf. 54.

[13]4 Kent. Comm. 262; Morse *v.* Faulkner (1792) 1 Anstr. 11. Equity also would grant a contingent remainderman an injunction to stay future waste by the life tenant, though the common law action of waste was not open to him. Cannon *v.* Barry (1881) 59 Miss. 289.

[14]See 9 COLUMBIA LAW REVIEW 546.

[15]Bishop *v.* Fountaine (1694) 3 Lev. *427; Fearne C. R. (10th ed.) 366.

[16]Jones *v.* Roe (1788) 1 H. Bl. 30. Aff'd, (1789) 3 Durnf. & E. 88. For a criticism of this holding, see 9 COLUMBIA LAW REVIEW 546 *supra*, and Perry *v.* Philips (1790) 1 Ves. Jr. 251. This case gave rise to a now well-settled rule, but it was necessary to hold that a contingent remainder was an "interest in land in fee simple," and that the "fee simple" referred only to the land and not to the "interest."

[17]See Butler's Note in Fearne C. R. (10th ed.) 2.

[18]Challis, Real Prop. (3rd ed.) 76, 77; 1 Preston, Estates, *75.

[19]2 Blackstone Comm. 169; Fearne C. R. (10th ed.) 363.

to a mere possibility would probably be taxable, and, likewise, immune from subsequent taxation if it had previously accrued by the testator's act of disposition. In any event, however, contingent remainders are by statute generally, to-day, freely alienable, devisable and also indestructible,[20] and must by virtue of these statutory attributes be considered property of a sufficiently valuable and definite nature to be immune from the retroactive force of such a statute as that in the principal case.[21]

"ACTIVE" OR "PASSIVE" NEGLIGENCE AS AFFECTING THE DOCTRINE OF THE "LAST CLEAR CHANCE."—The doctrine of the "last clear chance" cannot, it seems, be invoked in a case where the defendant has failed merely to discover the peril of a trespasser,[1] for in general there is no duty to anticipate his presence.[2] On the other hand, if the defendant, after discovering the peril,[3] fail to exercise ordinary care and injury results,[4] the application of this doctrine will almost universally support a recovery in favor of the injured party,[5] whether a trespasser or not.[6] Such a result seems logical, if the basis of the doctrine be found in the statement, enunciated in the earliest cases on the subject[7] and repeated many times since,[8] that the plaintiff's negligence will not excuse the defendant where the latter by the exercise of due care might have avoided the ensuing injury. The inevitable result of the literal acceptation of this statement as a test of liability, is that the "last

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[20]See 2 Reeves, Real Prop. § 904; N. Y. Real Prop. Law §§ 47, 49.

[21]See Executors of Eury *v.* State (1905) 72 Oh. St. 448; Ross, Inheritance Taxation § 37.

[1]See note to Southern Ry. Co. *v.* Bailey (1910) 27 L. R. A. [N. S.] 379.

[2]Burdick, Torts (2nd ed.) 458. But railroads may be required to keep a lookout for trespassers; certainly where their presence is to be anticipated. See note to Frye *v.* St. Louis etc. Co. (1906) 8 L. R. A. [N. S.] 1069; Beach, Contributory Negligence (3rd ed.) §§ 196-203.

[3]In the case of railroads the "peril" would not seem to arise until the actual nature of an object on the tracks were discovered or the presumption that a person would normally get off the tracks on the approach of a train were rebutted by the discovery of the actual situation. See note to Louisville etc. Co. *v.* Hathaway (1905) 2 L. R. A. [N. S.] 498; Beach, Contributory Negligence (3rd ed.) § 203.

[4]The defendant's neglect after the discovery of the peril is not distinguishable by many from wanton or wilful misconduct. Beach, Contributory Negligence (3rd ed.) § 55; Little *v.* Ry. Co. (1894) 88 Wis. 402.

[5]B. & O. R. R. Co. *v* Hellenthal (1898) 88 Fed. 116; Romick *v.* C. R. I. & P. Ry. Co. (1883) 62 Ia. 167; Denver etc. Co. *v.* Dwyer (1894) 20 Colo. 132; but see French *v.* Grand Trunk Ry. Co. (1904) 76 Vt. 441; Butler *v.* Rockland etc. Co. (1904) 99 Me. 149.

[6]For the duty of ordinary care is owed a trespasser after discovery of the peril. 1 Shearman & Redfield, Negligence (4th ed.) § 99; Ill. Cent. Ry. Co. *v.* Middlesworth (1868) 46 Ill. 494; but see Terre Haute etc. Co. *v.* Graham (1883) 95 Ind. 286.

[7]Davies *v.* Mann (1842) 10 M. & W. 545; Tuff *v.* Warman (1858) 5 C. B. [N. S.] 573.

[8]Radley *v.* L. & N. W. Ry. Co. (1876) L. R. 1 App. Cas. 754; Grand Trunk Ry. Co. *v.* Ives (1891) 144 U. S. 408, 429; see Pollock, Torts (8th ed.) 460 *et seq.*